Supreme Court, U.S.
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No. 94-113

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN R. IVIMEY, SR.,

Petitioner,

v.

THE VARIABLE ANNUITY
LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Whether respondent's brief in opposition evades the issues raised on the petition herein by substantively not addressing such issues, raising irrelevant and distracting matter, misrepresenting the substance of the petition, basing procedural issues on state instead of federal rules and raising false premises as to the claims of the petitioner.

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Note: Refernce is also made to the Erie doctrine, p.15. and the Rice, Beckenstein and Graver Tank cases, pp. 8,9,15, cited by respondent.

STATEMENT

At the outset, it is manifest that respondent's brief in opposition does not squarely address the issues in the petition herein, nor rebut its cases and authorities. It would be redundant to repeat such herein, and thus petitioner leaves the same for this Court's own observation.

However, petitioner must reluctantly point out that respondent's brief is riddled with false premises, deceptions, quasi-truths and misstatements which are harmful to respondent, some so fundamental that it can be wondered whether its author was familiar with this case. The more flagrant of such prejudicial and biased assertions are as follows, a complete list being prohibitably long:

1. Respondent falsely asserts petitioner "fared poorly" and (the contract betwwen the parties) was

"terminated effective March 1985." In fact, no evidence was ever introduced at trial to support such assertion, nor that either party complied with the provision in the contract which states:

> "This contract may also be terminated by either party for any reason by giving the other party 30 days advance written notice or by mutual consent of both parties at any time."
>
> (Note: This provision was cited in the petition, p.4, wherein by typographical error the word "notice" was inadvertantly omitted.)

Moreover, respondent did not plead such matter as an affirmative defense, as required.

2. Respondent curiously asserts trial commenced on claims of breach of constructive condition. Instead it has always been universally agreed

that what was it issue is breach of an implied promise, the court having long before found a claim for constructive condition inapplicable.

3. Respondent asserts this case arises out of an "employment relationship" whereas the parties' contract, ¶3.3, expressly provides that petitioner is an "independent contractor," and there was never an issue raised as to that status in the court below.

4. Respondent falsely asserts that petitioner now claims the courts below "misconstrued his evidence." Rather, the gravamen of the petition is on the issue as to whether or not the dismissal below could possibly be upheld in view of the fact that no evidence was before the court showing termination ever occurred or that any such defense was pled, and

on the additional issue whether bar of petitioner's CUTPA claim can be upheld on statute of limitations grounds where the district court never ruled on such grounds, and such issue was not before the circuit court on any appeal or cross appeal.

5. Respondent falsely asserts petitioner "for the first time" now claims his contract was never terminated. Instead petitioner has continuously made that claim, and it is included in his circuit court brief, pp.8,10,14,21, insofar as it could be determined whether the district court's dismissal on unspecified grounds might have included a termination factor, and in his reply brief, pp.2,3,4,5,6,7,8,9,10, after res-

pondent, for the first time, referred to such matter in its brief. Respondent never having plead any such affirmative defense, petitioner had considered it waived.

6. Respondent falsely implies that petitioner claims the issue of jurisdiction "must be submitted to the jury." In fact, what petitioner contends is that the court's dismissal was based upon factual issues which required a jury verdict upon which the court's jurisdictional ruling was required to be predicated, and that a jury verdict on the issue of breach of covenant of good faith and fair dealing was appropriate even if it could have been shown the contract was terminated. The court completely ignored the latter claim and the issues it invoked.

7. Respondent deceptively implies, p.15, that petitioner claims the CUTPA claim should be allowed for the reason the affirmative defense of statute of limitations was not properly raised by respondent, asserting petitioner is "wrong" because such defense was pled. In fact, respondent cannot be unaware that the reason instead is that respondent failed to raise such matter on appeal, (Pet. pp.7,8). Respondent agrees that the court did not address the statute of limitations issue, p.16; it was thus respondent's duty to raise such matter on appeal if it chose to do so. Respondents admit they "raised" such in their "brief," in the circuit court, but such was not at issue in that court, not only

because such was not a matter on appeal to the circuit court, but also because there was no ruling below on said issue which could be the subject of review.

REASONS FOR GRANTING WRIT

I. The Issues Presented on this Petition are Legal Issues of Special Importance, and the Courts Below are In Conflict with the Estabiashed Law and Precedents on Such Issues

1. The issues presented on this petition are legal issues of special importance, and the courts below are in conflict with the established law and precedents on such issues, notwithstanding respondent's specious assertions otherwise. Respondent's failure to address or rebut the facts, cases and authorities set forth in the petition evinces their merit and importance and respondent's awareness therof. Moreover, the cases respondent cites are genrally of neu-

tral value , irrelevant, inappropriate or contrary to respondent's own arguments. Such includes the Rice case, which is far removed from anything pertaining the case herein. In that case a divided Supreme Court contends with a unique situation described by Justice Black, @ 349 U.S. 70, 80, 75 S. Ct. 614, 620, 99 L. Ed. 897, 905-905, as follows:

> The Court dismisses the case because the Iowa Legislature has provided that every person in Iowa except one who has already filed a suit can prosecute claims like this. Apparently this law leaves everyone in Iowa to vindicate this kind of right except the petitioner. This raises a new question of denial of equal protection of the laws equally as grave as those which prompted us to take this case originally.

Thus Rice involves a defense anchored to the validity of a statute as a bar to an action:

> ...where it appears on further deliberation, induced by new considerations, that the case was not appropriate for adjudication.

See @ 349 U.S. 70, 79, 75 S. Ct. 614, 619, 99 L. Ed. 897, 904.

Moreover, respondent's citation from Rice is mere dicta quoting a speech given in another context outside any judicial forum, and it is difficult to reconcile it with any express question of law or fact.

Respondent next implies that petitioner proposes that this Court review findings of fact, by citing the Graver Tank case out of context, p.10, although respondnet dilutes that false implication by then stating that the issues presented ..." are governed by long established legal principles...." In fact, it is not findings of fact that characterize the errors below, but failure to apply procedural rules in disregard of facts.

This petition concerns very real legal questions as to whether courts below may rule contrary to a party in reliance on

matter not pled by his adversary which there was a duty to plead, whether appeals courts may base rulings on matters not on appeal nor ruled upon by courts below and whether courts may rule for a party in the absence of evidence favoring that party. Such legal issues have little or nothing to do with findings of fact, are not "academic" nor "episodic," but rather are real legal issues arising out of overt deprivations of due process, all in conflict with established federal principles of law.

II. Petitioner has Not Raised Any New Issue for the First Time on this Petition for Writ of Certiorari

Petitioner has not raised any new issue for the first time on this Petition for Certiorari. Such assertion by respondent, p.11, is irresponsible, false and without any merit or foundation, supra pp.1-2,4-5. Perhaps the assertion stems from what appears to be lack of familiarity with this

case on the part of the author of respondent's brief, or respondent's paucity of any basis for opposition to the petition. Moreover, in its STATEMENT(of the case), pp.2-8, respondent does not even assert the parties' contract was ever terminated.

In fact, the termination issue was central to the entire argument in the circuit court, relating to the propriety of the district court's ruling on petitioner's motion to reconsider its order dismissing this case on jurisdictional grounds, where the district court, for the first time, asserted the parties' contract had been terminated. (Pet. pp.3-6, A5,A6)

The record clearly reflects the foregoing, showing the centrality of the termination issue, and there is no merit to any assertion to the contrary on the within Petition for Writ of Certiorari.

Respondent's citations are irrelenant.

Respondent, moreover, seeks to imply that this termination matter applies only to the sums of technical damages respondent owes petitioner. Instead, this matter is chiefly addressed herein, as it was in the courts below, to the question as to propriety of the dismissal on jurisdcitional grounds, based on a non-existent termination of the parties' contract.

III. Respondent Attempts to Deceive this Court as to the Propriety of the Circuit Court's Ruling that Petitioner's CUTPA Claim is Barred By the Statute of Limitations

Respondent attempts to deceive this Court as to the propriety of the Circuit Court's ruling that petitioner's CUTPA claim is barred by the statute of limitations. Respondent does so by falsely asserting that..."petitioner"...claims... "the defense of statute of limitations was not properly raised by respondents;..." and then stating..."the respondents did in

fact plead the statute of limitations as a special defense"..., p.15, supra pp.6-7.

This diversion begs the question, because petitioner's actual claim is that respondent did not raise on appeal, or cross appeal, any issue pertaining to the fact that the district court did not rule on respondent's motion seeking denial of the CUTPA claim on statute of limitations grounds. Hence no such matter was before the circuit court for review.

To compound the impropriety of both respondent and the circuit court, respondent admits such practice and the holding of the circuit court rely upon the same issue's introduction "in their brief" in the circuit court, as an "alternative" argument, p.16.

Such admitted error ought be of the greatest consternation to this Court. Not only was respondent's attempt to obtain an

original ruling in the circuit court a gross impropriety, but the circuit court's grant of such ruling is mind-numbing. See petition, pp.17-18, citing the limitations on the jurisdiction of Courts of Appeal, substantively admitted in respondent's brief, p.12.

In fact, the circuit court appears not to have addressed at all the CUTPA issue actually on appeal before it, namely whether the district court holding barring the CUTPA claim, due to petitioner's asserted "employment" status, was erroneous, even though, on oral argument, the court asked respondent on what rationale it could construe petitioner to be an "employee."

IV. Respondent's Assertion Petitioner Was required to plead Fraudulent Concealment is Gravely Flawed

Respondent's assertion petitioner was required to plead fraudulent conceal-

ment is gravely flawed, for it expressly relies upon Connecticut procedure. It is elemental, under the Erie doctrine, that in federal courts federal procedure controls, and all state procedural practice is irrelevant, pp.16-18(Res. Brief).

Rule 7(a) of the Federal Rules of Civil Procedure (F.R.C.P.) makes no provision for filing a reply to affirmative defenses. The rule provides that..."There shall be a complaint and an answer,...and ..."no other pleadings shall be allowed," unless the Court orders otherwise.

Indeed, even under the applicable Connecticut practice petitioner has no duty to anticipate that respondent might raise an affirmative defense when drafting his complaint, as respondent seems to imply. The Beckenstein case respondent cites expressly relies on Rosenblatt v. Berman, 143 Conn. 31, 39-40, 119 A.2d 118,

which clarifies that, under Connecticut practice, a plaintiff's fraudulent concealment pleading is required only in a Reply pleaded after a defendant's plea of the statute of limitations.

Therefore respondent's assertions are erroneous on all possible grounds. Respondent appears to rely more on anticipated oversights by this Court than on the law, for it is difficult to suppose respondent is unaware of the foregoing.

What respondent is suggesting is that, in presenting his own case, petitioner is obliged to anticipate defenses respondent might raise and include speculative replies thereto in his complaint. Such a suggestion is absurd on its face, even if it was possible. Certainly the federal rules have no such bizarre requirement, but rather allow that a plaintiff may raise objections to affirmative defenses if they are actually

proposed at trial or an appropriate proceeding.

Had respondent any genuine desire, or belief in the need, for a reply to affirmative defenses, it could have moved the court therefor, consistent with F.R.C.P Rule 7(a), but it did not do so.

V. Respondent's Inference that Petitioner Claims the Issue of Jurisdiction Must be Submitted To the Jury is Untrue

Respondent's inference that Petitioner claims the issue of jurisdiction must be submitted to the jury is untrue, p.14, and it does not address his argument that certain factual issues should have gone to the jury before any ruling on jurisdictional issues. Also, respondent's conclusory averments in this section are merely self-serving, and the cases cited are not related to any specific matter which might be before the courts; such is of particu-

lar note, because nowhere in its brief does respondent contest the fact that it did not plead any affirmative defense on the ground that the parties' contract was terminated. Such pleading is required as a prerequisite to any finding that the contract might have been terminated, and the dismissal for lack of juridiction which asserted such as a component therefor is thus necessarily erroneous, for no pleading of such termination as an affirmative defense is in the record, and no properly instructed jury could have found against petitioner in the absence of such pleading.

Even had the contract been terminated petitioner was entitled to a jury determination on respondent's motives in terminating, Fortune v. National Cash Register Company, 364 N.E.2d, 1251, 1255-1257(1977), holding that contracts contain implied covenants of good faith and fair dealing, and

a termination not made in good faith constitutes a breach of contract, citing Restatment (Second) of Agency, Sec.454 and Comment (1958), Lemmon v. Cedar Point, Inc., 406 F.2d 94, 97, Coleman v. Graybar Elec. Co., Inc., 195 F.2d 374, Uproar Co. v. National Broadcasting Company, 81 F.2d 373, 377 (1st Cir.), cert. denied 298 U.S. 670. 56 S. CT. 835, 80 L.Ed. 1393, Restatement(Second) of Contracts, Sec. 231 (Tent. Drafts Nos. 1-7 (1973), 5 S.Williston, Contracts, Sec. 670 (3d ed. 1961). The foregoing is particularly applicable in this case, for the district court expressly recognized that petitioner had pled breaches of good faith and fair dealings as to the breaches of contract pled.

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In summary, it thus can be fairly concluded that respondent has not addressed the actual issues presented on this petitioner

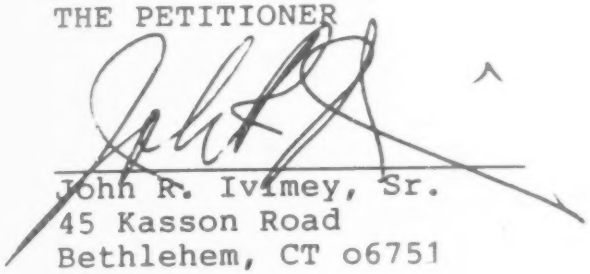
for Writ of Certiorari, but has instead sought to obscure the matters truly at issue in the manner set forth in its brief.

CONCLUSION

For the reasons stated herein, and in the petition, petitioner respectfully requests this Court to grant the within sought Writ of Certiorari.

Respectfully submitted,

THE PETITIONER



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